Supreme Court, U. S.
FILED
SEP 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

———— TERM, 1978

NO. 78-500

J. W. BROWN ..... *Petitioner*

vs.

J. C. DANLEY, ADMINISTRATOR ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI

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J. W. BROWN ..... *Petitioner*

VS.

THE HENRY SMILEY ESTATE ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI

Petitioner, J. W. Brown, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas, entered in this proceeding on May 22, 1978 (Petition for Rehearing denied June 26, 1978) affirming the decision of the lower court.

OPINION BELOW

The opinion of the Arkansas Supreme Court, a copy of which is set forth as Appendix "A" to this Petition, is reported as 263 Ark. 480, 566 S.W.2d, pg. 385. The Arkansas Supreme Court practice is not to issue formal opinions or notices of denial of Petition for Rehearing. Petition for Rehearing denied June 26 1978.

JURISDICTION

The judgment of the Arkansas Supreme Court which is sought to be reviewed was entered on May 22, 1978. On

June 26, 1978, the Arkansas Supreme Court denied Petitioner's Petition for Rehearing of the case. The present Petition for Writ of Certiorari is being filed within the ninety days (90) of the aforementioned Order.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether or not the Arkansas Statute 61-141(b) and (d) is unconstitutional as a denial of Equal Protection and Due Process.

2. Whether the *Trimble v. Gordon* case overruled the *Bell v. Bell* case, and Arkansas Statute 61-141(b) and (d) by implication, and whether the Arkansas Supreme Court failed to apply and misconstrued the *Trimble v. Gordon* decision of this Court.

3. Whether the Lord Mansfield Rule, which prohibits the testimony of the mother as to non-access presents an impenetrable barrier, is unduly burdensome and effectively denies Petitioner equal access to the Judicial System, Equal Protection and Due Process.

4. Finally, the question is whether the Lord Mansfield Rule, which appears to be racially neutral on its face, is an instance of covert racial discrimination because it does, in fact, operate far more severely upon Negroes as a class than it does upon whites.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Arkansas Statute Annotated 61-141(b) and (d):

"If a man have a child or children by a woman, and afterward shall intermarry with her, and shall recognize such child or children to be his, such child or children shall be deemed and considered as legitimate.

An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from such child's mother or her blood kindred; but such child may not inherit real or personal property from his father or his father's blood kindred."

STATEMENT OF THE CASE

The Petitioner, J. W. Brown, filed a Petition to be appointed Personal Representative of the estate of Henry Smiley, praying that Ark. Stat. 61-141(d) be declared unconstitutional as violative of the Fourteenth Amendment and Fifth Amendment of the United States Constitution.

Petitioner was born the 19th day of September, 1937. He was a normal nine month baby. He was conceived, therefore, on or about December 15, 1936. During this time evidence has proven that Petitioner's mother dated and had sexual intercourse with Henry Smiley. The evidence has also proven that Inez Perry was unmarried at this time.

Mr. Smiley was a well-to-do businessman of good reputation. After discovering that Inez was pregnant, they planned to arrange a marriage to give the child a name and to protect the many various interests of Henry Smiley.

Under present Arkansas Law, Petitioner's mother, Inez Perry and Henry Smiley would have to marry and thereafter, Henry Smiley would have to acknowledge Petitioner as his son. Marriage is quite often due to circumstances legally impossible. Petitioner contends that the requirement of marriage in addition to acknowledging, is unconstitutional. *Weber v. Aetna*, 406, 164. It is an action over which Petitioner has absolutely no control. To require marriage in addition to acknowledgment has the effect of denying him a basic constitutional right to inherit property. Under the present laws, it was impossible for his father to marry his mother since he was already married to another person at the time of the Petitioner's birth.

Arkansas law creates an impenetrable barrier. Arkansas law appears to be racially neutral on its face but in fact individiously discriminates against blacks. Statistics show

a disproportionate number of black illegitimate children born. Petitioner's Exhibit No. 3, Page 4 of the Monthly Vital Statistics Report states, "The illegitimacy ratio increased nearly 8 percent during 1975, to 142.5 illegitimate births per 1,000 total live births. For white births, the ratio increased almost 12 percent to 73.0, while for Negro births, the increase was nearly 4 percent, to 487.9."

Although blacks make up only about 20% of the state's population, of 5,675 illegitimate births in Arkansas, in 1975, 4,264 were black, which figures 75.1%. The Due Process Clause prohibits invidious discrimination between groups or individuals, *Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 884.

Petitioner's claim challenges current Arkansas law in a number of respects. First, the *Bell v. Bell* case was effectively overruled by the recent United States Supreme Court case, *Trimble, et al v. Gordon, et al*, 430 U.S. 762 (1977), hence our State Supreme Court must establish other tests and standards which affords an illegitimate or an alleged illegitimate Due Process and Equal Protection. Second, Petitioner contends that our rules of proof of non-access, impotency and denial of mother's relevant testimony operates as racial discrimination and also denies Petitioner Due Process and Equal Protection. Third, Petitioner contends that the avenue afforded him and members of his class is too restrictive and violative of the Fourteenth Amendment and Fifth Amendment of the United States Constitution. Petitioner has no control over the actions and conduct of his parents and should not consequently be punished for their actions and conduct.

Petitioner has proven considerable acknowledgment of himself, relatives, family and father. Arkansas' law is an impenetrable barrier preventing Petitioner from sharing in

his father's estate. *Washington v. Davis*, 426 U.S. 229, 48 L. Ed. 597, 96 S.Ct. 2040. "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bear more heavily on one race than another."

On May 13, 1977, the Chancery Court of Phillips County, Arkansas denied Petitioner's Petition (R. 296-301). At trial, Petitioner objected to the exclusion of the mother's testimony of non-access and the objections were overruled. Appellant appealed from the judgment of the Chancery Court of Phillips County, Arkansas (R. 303-306).

On May 22, 1978, the Arkansas Supreme Court affirmed the decision of the lower court in an opinion set forth in Appendix "A", infra, and reported as Brown v. Danley, 263 Ark. 480 566 S.W.2d 385 (1978). The Arkansas Supreme Court denied Petitioner's Petition for Rehearing of the case on June 26, 1978.

HOW THE FEDERAL QUESTIONS AROSE

1. The constitutionality of Arkansas Statute 61-141 (d) was raised by Petitioner's original pleadings (R. 12-19). The Chancery Court of Phillips County, Arkansas denied the Petition and constitutionality and the Arkansas Supreme Court affirmed, sustaining 141(d) against all constitutional challenges.

2. The Lord Mansfield Rule was raised and challenged by objection to the offer of the mother's testimony of non-access and paternity of Petitioner. Petitioner's attorney objected to the exclusion of said testimony; Petitioner's objections were overruled. The Arkansas Supreme Court affirmed holding that this rule of evidence is not racially discriminatory (App. 16) and did not deprive the party of

his property without due process or equal protection of the law.

3. Paragraph 12 of Petitioner's Petition, filed in the Probate Court of Phillips County, Arkansas, reads as follows, "In the alternative, Petitioner respectfully requests the Court to declare Arkansas Statute 61-141(d) as unconstitutional as violative of the Fourteenth Amendment of the United States Constitution. That such statute denies the Petitioner both Equal Protection and Due Process of the laws of the United States."

ARGUMENT

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The application of the *Trimble v. Gordon* case involves a substantial federal question going to the very heart of the present case. The issue is the constitutionality of the Arkansas Statute specifically, but generally it is the constitutionality of all state statutes and rules of evidence regarding inheritance of illegitimates.

Under present Arkansas law, an illegitimate can inherit only if the mother and father marry and the father subsequently acknowledges the child. The Chancellor of the Probate Court of Phillips County, Arkansas held, "There was considerable evidence presented tending to prove that the deceased, Henry Smiley, had access to Inez prior to her marriage to Brown and thereafter, and that after the birth of this Petitioner, he had, by *words* and *actions*, acknowledged him as his son."

A Writ of Certiorari should be granted to establish uniform rules of evidence that will afford an illegitimate procedural due process in establishing paternity.

Trimble v. Gordon, "Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffecutal, as well as an unjust, way of deterring the parent.

Our country has seen a constant change in the rights and privileges of illegitimates in the field of Workmen's Compensation, Social Security and inheritance by illegitimates. The Lord Mansfield Rule has been declared unconstitutional by the Supreme Court of Texas.

The Rules of Evidence subjects illegitimates to a second-class way of life. Society has generally resented illegitimates. The illegitimate is a living symbol of social irregularity. The present case presents a problem as old and unsolved as human existence. "Hard questions cannot be avoided by a hypothetical reshuffling of the facts," *Trimble v. Gordon,* 430 U.S. 762, 1977.

The current Rules of Evidence, specifically the denial of testimony of the mother, creates an almost unassailable presumption of legitimacy when a child is born in wedlock, or born out of wedlock followed by a marriage.

Recent statistics have shown that 50% or more of all black children born are illegitimate. Consequently, the current rules of evidence has the effect of operating far more severely upon blacks as a class than it does upon whites.

It is unquestioned that the Equal Protection and Due Process Clause of the Fourteenth and Fifth Amendments of the Constitution requires, at a minimum, that a statutory

classification or Rule of Evidence bear some rational relationship to a legitimate state purpose. *Weber v. Aetna Casualty and Surety Company,* 406 U.S. 164. The Lord Mansfield Rule fails this test, for it punishes innocent children for the transgression of their parents. The Arkansas law at present places a burden upon Petitioner that he has no chance of overcoming and therefore deprives him of his property rights without due process and equal protection of the law. The requirement of marriage and subsequent acknowledgment punishes him for the actions and/or inactions of his mother and father.

A Writ of Certiorari should be granted to establish just, fair and uniform Rules of Evidence. This case had broad significance for urban populations as a whole and black communities in particular within and outside the State of Arkansas.

The effect of the Arkansas Rules of Evidence punishes innocent children for the transgressions of their parents and make it unreasonably difficult for the illegitimate to establish paternity. This is especially true with the present case because there is considerable evidence of acknowledgment by the father, numerous neighbors, acquaintances and associates of the father. What else can the illegitimate do? The child is disadvantaged under a suspect classification. Additionally, a mother may have interest conflicting with those of her illegitimate child. For example, she might wish to avoid the public embarrassment of a paternity proceeding, or a strong emotional attachment to the father may stop her from bringing an action. The father, in most cases, may be married and as in this case a respected businessman. Whatever the reasoning, no action, conduct or demeanor of the illegitimate contributes to his status under the law.

The most recent Supreme Court case, *Trimble v. Gordon,* 430 U.S. 762 (1977), held "Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts." The Bell case establishes an unduly burdensome method of establishing paternity. *Gomez v. Perry,* 409 U.S. 535 also held "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez,* 409 U.S. at 538.

Although this Court has not ruled on the precise issue of the constitutionality of the Lord Mansfield Rule, other states have begun to treat the rule as suspect. In *Davis v. Davis,* 521 S.W.2d (Tex. 1975), the Texas Supreme Court held, "Testimony of non-access between husband and wife is admissible from any witness knoweldgeable of the fact, including husband and wife."

The National Center for Health Statistics Report showed that 50.3 percent of all black births in the United States in 1976 were to unmarried women. The monthly Vital Statistics Report revealed that, although blacks make up only about 20% of the Arkansas population, of 5,675 illegitimate births in Arkansas in 1975, 4,264 were black, which figures 75.1 percent. The Due Process Clause prohibits invidious discrimination between individuals or groups, *Bolling v. Sharpe,* 347 U.S. 497, 98 L. Ed. 884.

In addition to the overt discrimination on the basis of the criterion of illegitimacy, the Arkansas Statute, Case Law

and Rules of Evidence covertly discriminates on the basis of race. While the statute employs no racial criterion on its face, it operates far more severely upon blacks as a class that it does upon whites. Disproportionately more black children than white children are born out of wedlock. Nationally, in 1963, the Vital Statistics Division of the Public Health Service, the United States Department of Health, Education and Welfare estimated that the white illegitimacy rate was 30.7 per 1,000 live births with a contrasting 235.9 per 1,000 for non-whites. According to the monthly Cital Statistics, of 5,675 illegitimate children born in Arkansas in 1975, 4,264 were black.

This Court has consistently held that a state may not attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.

It is undisputed that prior to the marriage of Petitioner's mother, she dated and had sexual intercourse with Henry Smiley. That subsequently, Smiley acknowledged Petitioner and contributed support on numerous occasions and in numerous ways. This acknowledgment was corroborated by Dave Valley, Wiley Gross, Willie Fraction, James Valley, Webster Williams, Willie Hall, Jr. and Rachael Harper.

"Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual, as well as unjust way of deterring the parent." *Trimble v. Gordon; Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175.

"The parents have the ability to conform their conduct to society norms, but their illegitimate children can affect neither their parents conduct, nor their own status." *Trimble v. Gordon, supra.*

CONCLUSION

1. The relevant question is whether or not Arkansas' *Bell v. Bell* case affords the Petitioner Due Process and Equal Protection of the law, and whether the Arkansas Supreme Court has misconstrued and failed to apply the holding of *Trimble v. Gordon*. This Court has never ruled on the constitutionality of the Lord Mansfield Rule.

2. The Arkansas Supreme Court has ruled that the Lord Mansfield Rule is not racially discriminatory, despite its disproportionate effect upon blacks as a class. This Court has never ruled upon the issue.

3. A significant question is whether consonant with the Fourteenth Amendment a citizen of the United States can be denied the inheritance of the man who acknowledged paternity and who had access to Petitioner's mother prior to and after her marriage. More precisely, whether or not consonant with the Fourteenth Amendment, Petitioner can be denied inheritance unless his mother and father marry and his father subsequently acknowledges him. This clearly punishes him for the actions and/or inactions of his parents.

Respectfully submitted,

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Appendix

APPENDIX "A"

DIVISION 1

SUPREME COURT OF ARKANSAS

No. 77-390

JOHN W. BROWN, *Appellant*	Opinion Delivered May 22, 1978.
v.	Appeal from Phillips Probate Court
J. C. DANLEY, Administrator, *Appellee*	George K. Cracraft, Judge Affirmed.

George Rose Smith, *Associate Justice*

GEORGE ROSE SMITH, J. This appeal questions the constitutionality of our statutes and rules of evidence which create an almost unassailable presumption of legitimacy when a child is born in wedlock. The argument is that our laws deny equal protection to black persons. We find no merit in the appellant's assertions of unconstitutionality.

The appellant, John W. Brown (Jr.), is a black man who was born in Phillips county on September 19, 1937. Four and a half months earlier his mother, Inez Hall, had married John W. Brown. The appellant's birth certificate recited that his parents were John W. and Inez Brown. The elder Brown died on November 30, 1938, when the appellant was about 14 months old. The appellant was brought up by his maternal grandparents and has lived in Phillips county practically all his life.

In 1976 Henry Smiley, a black man of substantial means who had owned a liquor store in Helena, died in Phillips county. Smiley had lived with his wife, Lela, from their marriage in 1910 until Lela's death in 1965. The couple had no children. The appellee, J. C. Danley, was appointed as administrator of Smiley's estate. The appellant then filed in the probate court the petition that gives rise to this appeal. The appellant asserts that the decedent, Henry Smiley, was the appellant's natural father and that the appellant is thereby Smiley's sole heir. The petition asks that the appellant be appointed as administrator and be declared to be entitled to the entire estate.

At the trial the appellant's proof was twofold. First, several witnesses testified that Henry Smiley had sometimes said that the appellant was his son. That testimony was inferentially contradicted by other witnesses, related to or associated with Smiley, who stated that Smiley never indicated that he had any children. Second, the appellant proffered his mother's testimony that Smiley was the appellant's father and that she had not had sexual relations with her husband, John W. Brown, before the appellant's birth. The probate court held the proffered testimony to be inadmissible, under our settled rule that parents cannot bastardize a child born in wedlock by testifying to their own nonaccess to one another. *Thomas v. Barnett,* 228 Ark. 658, 310 S.W.2d 248 (1958).

There is a statutory presumption that a child born during a marriage is the legitimate child of both spouses. Ark. Stat. Ann. §61-141(a) (Repl. 1971). That statutory presumption is buttressed by the common law presumption that a child born to a married couple is the child of the husband. The common law presumption continues until it

is overcome by the clearest proof that the husband was impotent or was without access to his wife during the time the child might have been conceived. *Thomas v. Barnett, supra.* We have indicated, without having to decide, that the common law presumption may be weaker when the child was conceived before the marriage. *Jacobs v. Jacobs,* 146 Ark. 45, 225 S.W. 22 (1920).

If our presumptions and rules of evidence are valid, the probate court's judgment was unquestionably correct. The proffered testimony of the appellant's mother was inadmissible. There is no proof either that John W. Brown (Sr.) was impotent or that he had no access to Inez Hall when their son might have been conceived.

The pivotal question, then, is whether our presumptions and rules of evidence are valid. Preliminarily, the appellant's argument presupposes the unconstitutionality of our statute which permits illegitimate children to inherit from their mothers but not from their fathers. §61-141(d). A similar statute was held unconstitutional in *Trimble v. Gordon,* 430 U.S. 762 (1977), although in that case the illegitimate child had been both acknowledged as and judicially determined to be the asserted father's daughter. We need not determine whether that factual distinction between the cases makes any difference, because we would reach the same conclusion in this case even if our statute were held to be invalid.

In attacking our presumptions and rules of evidence the appellant insists that their effect is to discriminate against him simply because he is black. This novel argument runs as follows: The legal rules make it more difficult for an illegitimate person to prove the identity of his real

father. Statistics, which we need not repeat, show that about 50% of the black children born in Arkansas are illegitimate, but only about 5% of the white children are illegitimate. Hence, it is argued, the legal rules deny the appellant his right to equal protection, because they operate more severely upon blacks as a class than upon whites as a class.

It seems to us that the appellant's train of reasoning is fallacious in several particulars, but only two considerations need be mentioned to explain our inability to accept the argument.

First, even assuming that the appellant's statistics can be applied to children born in wedlock, the legal rules clearly do not result in discrimination against blacks as compared to whites. The rules do make it more difficult for a child born in wedlock to prove that he was actually illegitimate, but color has nothing to do with it. In the circumstances a black child is competing for the inheritance with the decedent's black legitimate heirs, and a white child is competing with white legitimate heirs. The scales are evenly balanced.

Second, in addition to the fact that the challenged rules have no relation to color, they rest upon sound principles of public policy. The present case illustrates the reason for the rules. The appellant was born in 1937. His legal father died in 1938, leaving no estate as far as the record shows. Henry Smiley, a well-to-do man, died 38 years later. The appellant, in seeking to acquire Smiley's entire estate, argues that the rules *unfairly* prevent him from establishing his claim to inherit (at the expense of Smiley's other heirs).

But suppose the situation were reversed. Let the facts be the same except that it was Smiley who died with no estate in 1938 and John W. Brown died a wealthy man in 1976. If Brown's other heirs then argued that this appellant, although born in wedlock almost 40 years earlier, was in fact Smiley's illegitimate child, the State would have many reasons for creating presumptions and rules of evidence to protect the appellant's right to inherit from John W. Brown. We are not persuaded that the selfsame rules of law can be demonstrably desirable and justifiable in the one situation but unconstitutionally oppressive in the other.

Affirmed.

We agree. Harris, C.J., and Fogleman and Holt, JJ.

APPENDIX "B"

IN THE PROBATE COURT OF PHILLIPS COUNTY, ARKANSAS

IN THE MATTER OF THE ESTATE OF
HENRY SMILEY, DECEASED

NO. P 76-76

MEMORANDUM OPINION ON CLAIM OF
J. W. BROWN

In this proceeding J. W. Brown, born during lawful wedlock between Inez and J. W. Brown, Sr., a presumptively legitimate child of that marriage, seeks to have himself declared to be the illegitimate son of Henry Smiley, deceased, and as such the sole heir to a sizable estate. While recognizing that our courts have long adherred to the common law rule dating from antiquity that an illegitimate child cannot inherit from a putative father, it is urged that this rule as applied to him is unconstitutional and a denial of equal protection of the law. In a recent 5-4 decision of the Supreme Court of the United States it appears that that Court has declared it to be unconstitutional for a state to allow illegitimate children to inherit from their mothers but not from their fathers. The court has not had an opportunity to read that decision nor determine its scope. According to newspaper accounts however it was based upon a rejection by that court of the proposition that a state may attempt to influence the action of men and women by imposing sanctions on the children born of their illegitimate relationships.

However, in order to reach that question, the burden is upon this petitioner to bring himself within a class of

persons entitled to raise it. In this matter it is required that he prove by a proper quantum that he is, in fact, 1) illegitimate and 2) this deceased was the putative father. The chancellor concludes that he has proved neither basic fact.

The Court will not recite all of the evidence presented but will mention only that testimony deemed essential to a determination of the pivotal fact upon which this case must turn. The deceased was married in 1910 and lived continuously with his wife until her death in about 1965. He lived for a number of years on a farm owned by him in what was referred to as the "Skinners Lane" Community, lying some four or five miles (4-5 mi.) north and west of West Helena. In the year 1937 Inez Hall resided on that farm with her family as tenants of Smiley. In May of that year she entered into a legal marriage with J. W. Brown. This petitioner was born to her in September of 1937 while she was living with J. W. Brown and with whom she continued to live as his wife until his untimely death the following year.

There was considerable evidence presented tending to prove that the deceased Henry Smiley had access to Inez prior to her marriage to Brown and thereafter, and that after the birth of this petitioner he had by words and actions acknowledged him as his son. There was other evidence offered tending to prove from those close to Smiley by blood and association that he had always contended that he had no children. Suffice to say here that acknowledgment, if it be a fact, standing alone will not establish legitimacy or illegitimacy. Such fact, if it be a fact, can only have significance where there is a subsequent intermarriage between the putative father and the mother of the child. It can have none where the mother is a married woman under those circumstances here present.

Petitioner offered testimony of his mother, Inez Brown Perry, tending to prove that Henry Smiley, not her husband, was the father of this petitioner. This evidence was excluded by the court but is preserved in her proffer of proof. Petitioner objected to this ruling of the court, again on the ground that it denied Petitioner equal protection, asserting that as there were more black children born out of wedlock than white, that this rule denied that protection to those on whom it weighed most heavily. The court cannot agree upholding as hereinafter will appear, that this rule which excludes that testimony does not deny, but to the contrary affords protection to all parties which come within its purview.

This proffered evidence was excluded by the Court under a sound and well established rule which antedates our independence as a nation and was brought to this country as part of the common law. Where a child is born to a married woman during wedlock, her child is presumed to be that of her husband. This presumption, according to Arkansas law, is rebuttable but has been said to be one of the strongest known to the law. *Kennedy v. State,* 116 Arkansas 116. So zealously does the law seek to protect such children and so strong has it made this presumption of legitimacy that rebuttal evidence has been restricted to proof of non-access of the husband to his wife during the entire period during which the child in the course of nature might have been begotten (or that the husband was incapable of procreation, a contention not made here). Some of the learned text and cases from sister states describe the quantum of rebuttal proof to be so high and so clear and unequivocal "that it is not possible to hold a child to be a bastard *unless there is no judicial escape from that conclusion,*" and requires that "every reasonable possibility that

the husband might have been the father." 10 Cor. Jur. Sec. 39, *Bastards,* Section 6.

A corollary to this rule arose in our law as early as 1734 and was so clarified and strengthened by Lord Mansfield that it is often referred to as the "Mansfield Rule", (an interesting history of that rule and its rationale is contained in *Kennedy v. State,* 116 Arkansas 116-117). This rule restricts the testimony of the married mother to evidence *tending to prove non-access.* While she is held competent to testify to facts which "tend to prove" that he could not have had access to her due to separation by time and distance, she is incompetent to testify to the *single fact of non-access.* She is restricted to such testimony as to his whereabouts which would tend to show intercourse with him impossible at the time of conception but she may not testify that she did not in fact have intercourse with him during this period. Her proffered testimony as to acts of intercourse with Smiley and lack of it with Brown was clearly incompetent under this rule.

According to the evidence Brown and Inez resided within a few miles of each other during the period at which conception must have taken place. They attended the same church and social functions. Brown was a friend of Inez's brother, and often visited with him at the home in which she resided. Though there was no testimony of any intimate association between them, his presence in the same community with her *proved* the very fact of that access which our courts have held must be *disproved* to rebut the presumption. Boiled down to its simplest terms these rules imply that if a husband was so geographically situated at the critical time that he might have had intercourse with his wife, he is presumed to have done so. Neither partner to this marriage is competent to testify that he did not.

Intimate associations with others and even prove acts of intercourse or adultery do not rebut the presumption so long as the husband was in the same vicinity and might have taken the same liberties with her.

Does the obvious fact present here that Inez was already some three months (3 mos.) pregnant at the time of her marriage to Brown weaken or rebut the presumption? Petitioner urges that it does, emphasizing the language from several cases cited in this brief, that the presumption arises as to children "conceived after marriage." The facts in those cases indicate that the children involved were in fact conceived after marriage and that that particular language has no real significance. The chancellor disagrees with petitioner's assertion that *Jacobs v. Jacobs*, 146 Arkansas 49, supports his position. In that case the child was born two months (2 mos.) after the marriage was performed. In that court case the court declared "conception during wedlock is not essential to the presumption of legitimacy which arises from wedlock." Though the court in that case did discuss authorities in other states to the contrary, it is clear at least to the chancellor that the court adopted the view that the fact of marriage gives rise to the presumption, and that premartial conception does not weaken or rebut the presumption. That case makes it clear that the heavy burden of overcoming this presumption and the limitations upon rebuttal proof are applied with equal force in such cases. In so declaring our Court has followed the great weight of authority which so holds. 10 Cor. Jur. Sec. Supra, that premarital conception does not alter the rule and in such cases the burden of proof and limitations upon the proof imposed by the Mansfield Rule are the same.

That this must be true naturally flows from the clear intent and purposes of the evidentuary rules in question. The sole purpose of such rule is to protect the child born in wedlock in name and identity and from ridicule and the other consequences of illegitimacy. Some sister states have applied the rules to premarital conception based upon inferences which arise from marriage with full knowledge of the fact of pregnancy. Still others more soundly approach it from the standpoint of the interest of the law in protecting the innocent from those consequences over which they have no control. Such an interest compells the extension of the rule to such cases. Our Court in the Kennedy case cited with approval the following language "* * * (to permit the objectionable testimony) would cast a cloud upon the innocent offspring and subject it to handicaps and embarrassments that are always hurtful and most difficult to overcome."

Petitioner contends that the application of such rule would unconstitutionally deny him equal protection. This plea appears to be incongruous. The rule in question seeks to protect him from the consequences flowing from the conduct of his natural parents and afford him the same protection it affords all children born to married parents. Its purpose is to protect, not to deny. That in the peculiar situation presented by this record, the application of these rules denies this petitioner an undesirable status which he seeks for some supposed advantage can be of no consequence.

He was born in lawful wedlock to Inez Hall Brown and is entitled to and will receive all the protection which arises from that status. Under the circumstances here present she cannot be heard to bastardize her own child.

The petitioner is decared to be the legitimate son of Inez and J. W. Brown, and afforded all the protection, rights and privileges the law affords such offspring.

He is not the illegitimate son of Henry Smiley, has not been denied equal prctection of the law, and his claim is dismissed.

Dated this 13th day of May, 1977.

/s/ George K. Cracraft
Chancellor and Probate Judge